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“Caterpillar: Who are YOU?  
Alice: This was not an encouraging opening for a conversation. I -- I hardly know, sir, just at present -- at least I know who I was when I got up this morning, but I think I must have been changed several times since then.”

*Lewis Carroll, “Alice in Wonderland”*

The rise of the “participative web” and increasing involvement of users in developing digital content are the new features of society and economy. Driven by increased broadband access, new software tools and intelligent web services, the Internet users now evolve from passive consumers to more empowered and active individuals who edit, comment and create. Such decentralized media production or user-generated content (UGC) is a significant social phenomenon that transforms our thinking on media pluralism and diversity. However, the question emerges whether and how governments would prioritize the further development of UGC?

An Ofcom annual report (Communications Market Report 2007) <sup>1</sup>has revealed that there is a clear shift among young audience from the simply keyboard based to video-based experience: among ten years old children 7% of users have web camera; and among 13-15 years old group the number has doubled to 15% <sup>2</sup>. This let us to believe that in the future young population might make their choice rather in a favour of video-based than text-based UGC formats. Or how Jacobs Rowbottom put it: “there is no reason to assume that the blog will be the dominant format in the future. Already, there is talk of podcasting and videoblogging superseding the text-based blog.”<sup>3</sup> Therefore, there is possibility that audiovisual applications of UGC once will reach the degree of democratic contribution that today’s blog is famous for. The question is: Will they?

This paper addresses the question whether AVMS Directive affects the further development of UGC, in particular its audiovisual applications. The discussion will be driven in accordance with the following structure: In the first part, the overview will be provided to cover main characteristics of UGC. The second part will focus on three policy objectives that can be decisive for the further growth of UGC environment: 1) Net neutrality: setting choice with users. 2) Securing autonomy of UGC participation and access; 3) Enhancing degree of public elevation. The main aim of the third part, Broadcasting Regulation, is to address the indirect impacts of the first proposal of AVMS as assessed by Rand Report in the context of historical distinction between Broadcasting and Communications regulations. The discussion will close by a conclusion provided in Part 4.

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<sup>1</sup> Ofcom, ‘The Communications Market 2007’, [http://www.ofcom.org.uk/research/cm/cmr07/cm07\\_print/](http://www.ofcom.org.uk/research/cm/cmr07/cm07_print/)

<sup>2</sup> Economist, ‘Pathfinder kids’, 2007

<sup>3</sup> J. Rowbottom, ‘Media Freedom and Political Debate in the Digital Era’. (2006) *The Modern Law Review*.

### **1.1. Definition**

According to the definition of Wikipedia, user-generated content is “on-line content that is produced by users [i.e. non-media professionals (i.e..ordinary people.)) as opposed to traditional media producers such as broadcasters and production companies.”<sup>4</sup> UGC can be considered as a co-product of an innovative Web 2.0 environment that “enables commercial and non-commercial service providers to better harness the ‘collective intelligence’ of Internet users”.<sup>5</sup> This is possible due to the key element of Web 2.0 structure, “an implicit architecture of participation and built-in ethic of cooperation in which the service acts primarily as an intelligent broker, connecting the edges to each other and harnessing the power of the users themselves.”<sup>6</sup> Such architecture allows for users add value principle and means that “the more people use the system, the better system gets”<sup>7</sup>.

As summarized in the Report on “Participative Web: User-created content” (The Report), UGC has the following three central characteristics:

- Publication requirement that refer to the necessity of content to be published or otherwise being made publicly available;
- Creative effort that refer to the degree of creativity or creative effort as required by contribution. This means that users must add their own value and merely copying would not be considered as UGC.
- Creation outside of professional routines and practises refer to the requirement for UGC content being created by non-professionals, thus outside of the traditional media value chain. It can also imply to non-commercial nature of UGC business models.

However, how was underlined by the Report, the last characteristic is getting hard to maintain given that there are increasing trends towards the monetisation of UGC content and acquiring of UGC platforms by the established media.

### **1.2. Measurement.**

The measuring of UGC is not straight forward due to the facts such as decentralized nature of UGC production, duplication of the same content via range of content sites and the occasional difficulty of distinction of between UGC and other content.

While there are no official data regarding the exact number of unique users involved in creation of UGC, there are recourse data to confirm that broadband Internet users, in particular younger group, produce and share content at a high rate:

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<sup>4</sup> The section seek does not aim to provide a detailed evaluation of advertising, product placement or ‘detailed tier’ of linear regulation.

<sup>5</sup> ‘Participative Web: user-created content’ Report (2007)

<sup>6</sup> <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>

<sup>7</sup> *ibid.*

In countries such as Hungary, Denmark, Iceland, Finland, Norway, Germany, Poland and Luxembourg (in increasing order), in 2005 between 60 and 70% of Internet users aged 16-24 has posted messages to chat rooms, newsgroups or forums. One-fourth but sometimes half of all Internet users in some OECD countries in that age group have created a webpage. In France, about 37% of teenagers have created a blog. In 2005, 13% of all Europeans were regularly contributing to blogs. And another 12% were downloading podcasts at least once a month.<sup>8</sup>

The other remarkable detail is that according surveys about 62% of online content viewed by 21-year-olds is related to someone they happen to know.

### 1.3. Emerging value chains and business models

The main element that distinguish UGC value chain from the value chain of traditional media is the absence of an editor or how it was described in "Blog" by H. Hewitt: "there is no need to pursue anyone to be allowed to pursue anyone" since there is an opportunity for everyone to be heard in a system that allows to trespass all various entitles previously required for publishing of one's work. However, the absence of traditional media editor does not mean that UGC has no editor at all but that the public becomes the editor and former audience becomes "we, the media" who through recommendations and rating decide the popularity of content.

The ability of users to create and distribute content largely depends on availability of technological and software tools such as video cameras, microphones, high capacity PC and video editing software or commercial products such as Internet access subscription. Thus, these elements need to be considered among other elements of UGC value chain.

### 1.4. Drivers of user-created content

Drivers identified in Participative Web Report are following:

Technological Driver	<p>Increased broadband availability: high speed connection allows users to extend their media to the experience other than just simple text formats</p> <p>Increased hard drive capacity and processing speeds coupled with lower costs</p> <p>Rise of technologies to create, distribute, and share content</p> <p>Provision of simpler software tools for creating, editing, and remixing content without professional knowledge</p> <p>Decrease in cost and increase in quality of consumer technology devices for audio, photo, and video</p> <p>Rise of non-professional and professional UGC sites as outlets</p>
Social Drivers	<p>Shift to younger age groups (digital natives) with substantial ICT skills, willingness to engage online (<i>i.e.</i> sharing content, recommending and rating content, etc.) and with less hesitation to reveal personal information online</p> <p>Desire to create and express oneself and need for more interactivity than on traditional media platforms such as TV</p>

<sup>8</sup> Participative Web: user-created content. Report .2007

	Development of communities and collaborative projects Spread of these social drivers throughout older age groups and to fulfil certain societal functions (social engagement, politics and education)
Economic Drivers	Lower costs and increased availability of tools for the creation of UGC (e.g. for creating, editing, hosting content) and lower entry barriers Increased possibilities to finance related ventures and UGC sites through venture capital and other investment possibilities Lower cost of broadband Internet connections Increased interest of commercial entities to cater to the desire for user-created content and the long tail economics (including mobile operators, telecommunication service providers, traditional media publishers and search engines) Greater availability of money related to advertising and new business models to monetise content
Legal and Institutional drivers	Rise of schemes which provide more flexible access to creative works and the right to create derivative works

### 1.5.Types of user-created content

User generated content covers a broad range of applications such as blogs, wikis, social network sites, P2P sharing. The brief summary of some examples is provided below:

#### Blogs

A weblog or blog is a one of the oldest examples of user-generated content defined by H. Hewitt, as “ just a new means of transmitting of writing, one that bypasses completely all editors.”<sup>9</sup> Blogs can be seen as discussion boards where users/bloggers can exchange views on a wide range of topics from political elections to popular films. Blogs often operate in relation to the local environment and local communities that in turn influence topics of content covered. Also, in the countries of less democratic regimes, blogs are often seen as “samizdat of the web”, a new media means of personal expression that used to avoid control and support freedom of information and expression<sup>10</sup>. Among popular political blogs such as [www.huffingtonpost.com](http://www.huffingtonpost.com) or [www.samizdata.net](http://www.samizdata.net), the sector of topics covered by blogs confirms “long tail” distribution principle where even very unique concepts can find their audience. The examples include, [boingboing.net](http://boingboing.net) which aim to “promote pointless, yet strangely cool, time-wasting stuff on the net”<sup>11</sup> that won the Lifetime Achievement and Best Group Blog in 2006; or technology and electronic blogs as [techcrunch.com](http://techcrunch.com) or [engadget.com](http://engadget.com); cooking blogs as [chezpim.typepad.com](http://chezpim.typepad.com) or [chocolateandzUGChini.com](http://chocolateandzUGChini.com); lifestyle and fashion blogs such as [treehugger.com](http://treehugger.com) or [thesartorialist.blogspot.com](http://thesartorialist.blogspot.com); or philosophical discussion board as [crookedtimber.org](http://crookedtimber.org). Star blogs such as dailykos.com can reach million visitors per a month.<sup>12</sup>

<sup>9</sup> H. Hewitt, 'Blog ' (2005)

<sup>10</sup> "From sumizdat to blogging: globalization and new forms of political expression", International workshop, Budapest, Hungary, 20-21 February, 2008.

<sup>11</sup> "The world's 50 most powerful blogs", Guardian, March 16 2008

<sup>12</sup> Reference to daily weblog was made in "Blog". C

**Wikis:**

The most popular example of wikis is Wikipedia.com that is a participatory online encyclopaedia where users are allowed to write, edited and control content. As such, it capitalizes on a form of “collective intelligence” and build on members’ co-operation for a final result.<sup>13</sup> Therefore, Wikipedia represents a unique form of trust and engagement of users in content production and currently has about ten millions articles in 253 languages.<sup>14</sup> Apart of Wikipedia, there are also less know examples as wikispace.com and already there are talks projecting that specialized wikis will cause a fall of general wikis as Wikipedia in a period of several years’ time.<sup>15</sup>

**Social Network Sites**

The one of the most remarkable consequences of social network sites that they has lead to the creation of sub-cultures that altering the way trough which younger population approach communication and social aspects of their lives.

MySpace.com is a social network site where user can create its own space on the network via a creation of a personal profile. A part of “personal profile” will be the information that user decides to upload photos, video, or music. It is also possible to use the personal profile as a “personalised network” where one can invite others to discuss works via blog or “wall board” comments. Myspace.com also functions as “soulmates” search for users willing to establish groups based on the same interests. Today, MySpace has approximately 70 million primarily young users.<sup>16</sup>

The most recent example of social networks sites is Twine.com that is built on the foundational technologies of the Semantic Web, in particular its RDF technology and combines the experience of “networks of like-minded people” with a service that enable users to “organize, share and discover information around their interest”. Then Twine uses the data and the proprieties related to the data, like bookmark, tag or comment, to link related information, therefore allowing its users to search along different dimensions.

**Content and File sharing**

Flickr ([www.flickr.com](http://www.flickr.com)) is an archive service for photos which makes it possible for its users to upload and share their photo content with other members of the Flickr community. The service also make use of collaborative or community generated categorisation where ordinary users can attach freely “tag”-application as “The best way to store, search, sort and share your photos”. Recently Flickr has changed its storage policy and allowed no limitation on maximum storage size per account.

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<sup>13</sup> [http://www.c4ads.org/files/cads\\_report\\_UGC\\_jul06.pdf?PHPSESSID=1545febd6f1be27a7b01531937d0](http://www.c4ads.org/files/cads_report_UGC_jul06.pdf?PHPSESSID=1545febd6f1be27a7b01531937d0)

<sup>14</sup> <http://en.wikipedia.org/wiki/Wikipedia>

<sup>15</sup> [http://blog.ericgoldman.org/archives/2006/12/wikipedia\\_will\\_1.htm](http://blog.ericgoldman.org/archives/2006/12/wikipedia_will_1.htm)

<sup>16</sup> [http://www.forbes.com/entrepreneurs/2006/10/05/google-yahoo-youtube-ent-fin-cx\\_kw\\_1006wharton.html](http://www.forbes.com/entrepreneurs/2006/10/05/google-yahoo-youtube-ent-fin-cx_kw_1006wharton.html)



YouTube ([www.youtube.com](http://www.youtube.com) ). YouTube was created by Chad Hurley, Steve Chen and Jawed Karim, three ex-executives of PayPal Online Financial Service System, with the aim to build mass-market services offering video over the Internet. With a moto “Broadcast yourself”, YouTube enable the ordinary users to “become tomorrow’s broadcasters”. The site is built on a simple concept to allow users to post their own video on YouTube with comments and watch videos created by others. YouTube has attracted over 20 million users by 2006; users post more than 60, 000 videos per day and most interested in view clips three minutes and shorter. The scope of clips vary from a six minute entertaining ‘Evolution of Dance’ with close to 41 million hits to European Union production clips such as ‘European Films: What a joy’ with 440 000 hits, sex scenes from the key European movies clip “Film Lovers will love this” with 250 000 hits or “AIDS remember me” with 176 000 hits; or “For diversity. Against discrimination” with 35 000 hits. Apart of laymen users, professional media started to treat YouTube as additional marketplace open to development. Thus, many professional channels launch their YouTube version to expand audience reach; also many educational institutions, for instance Open University also have YouTube channels supported by video material “ to extend its commitment to broadening access to education.”<sup>17</sup>

Current TV ([www.currenttv.com](http://www.currenttv.com)) is an American 24-hour TV-channel that can also be viewed as a well-organized video-blog platform. The idea behind the channel is to become an interactive TV-platform for the internet generation between 18 to 34 years and provide them with a mixed model which combines video blog’s and reality TV’s features. Thus, the audience is encouraged not just to watch but also record, edit, and upload their own digital videos on Current TV’s website; furthermore, there is a special production guidance provided for those who decide to be involved in video production. Correspondingly, broadcasting schedule is decided via a democratic rating system that enables the best of submitted pods to be broadcasted among professional productions. Currently, 30 percent of Current TV’s programming is content created by its users or viewers.

Table 2: The summary of types of user-created content

Types of content	Description	Examples
Text, novel and poetry	Original writings or expanding on other texts, novels, poems	Fanfiction.net, Quizilla.com, Writely
Photo/Images	Digital photographs taken by users and posted online; Photosor images created or modified by users	Photos posted on sites such as Ofoto or Flickr; Photo blogging; Remixed images
Music and Audio	Recording and editing one’s own audio content and publishing, syndicating, and/or distributing it in digital format	Audio mash-ups, remixes, home-recorded music on bands websites or MySpace pages, Podcasting.
Video and Film	Recording and/or editing video content and posting it.	Movie trailer remixes; Lip synching videos; Video blogs and videocasting; Posting

<sup>17</sup> <http://www3.open.ac.uk/media/fullstory.aspx?id=14137>

	Includes remixes of existing content, homemade content, and a combination of the two.	home videos; Hosting sites include YouTube and Google Video; Current TV
Citizen journalism	Journalistic reporting on current events done by ordinary citizens. Such citizens write news stories, blog posts, and take photos or videos of current events and post them online.	Sites such as OhmyNews, GlobalVoices and NowPublic; Photos and videos of newsworthy events; Blog posts reporting from the site of an event; Cooperative efforts such as CNN Exchange
Educational content	Content created in schools, universities, or with the purpose of educational use	Syllabus-sharing sites such as H2O; Wikibooks, MIT's OpenCourseWare
Mobile content	Content that is created on mobile phones or other wireless devices such as text messaging, photos and videos. Generally sent to other users via MMS (Media Messaging Service), emailed, or uploaded to the Internet.	Videos and photos of public events, environments such as natural catastrophes that the traditional media may not be able to access; Text messages used for political organising.
Virtual content	Content created within the context of an online virtual environment or integrated into it. Some virtual worlds allow content to be sold. User-created games are also on the rise.	Variety of virtual goods that can be developed and sold on Second Life including clothes, houses, artwork

Table 4: Distribution platforms for user-generated content <sup>18</sup>

Type of Platform	Description	Examples
Blogs/Videoblog	Web pages containing user-created entries updated at regular intervals and user-submitted content that was investigated outside of traditional media	Popular blogs such as BoingBoing and Engadget; Blogs on sites such as LiveJournal; MSN Spaces; CyWorld; Skyblog
Wikis and Other Text-Based Collaboration Formats	A wiki is a website that allows users to add, remove, or otherwise edit and change content collectively. Other sites allow users to log in and cooperate on the editing of particular documents.	Wikipedia; Sites providing wikis such as PBWiki, JotSpot, SocialText; Writing collaboration sites such as Writely
Sites allowing feedback on written works	Sites which allow writers and readers with a place to post and read stories, review stories and to communicate with other authors and readers through forums and chat rooms	FanFiction.Net
Group-based aggregation	Collecting links of online content and rating, tagging, and otherwise aggregating them collaboratively	Sites where users contribute links and rate them such as Digg; Sites where users post tagged bookmarks such as del.icio.us
Podcasting	A podcast is a multimedia file distributed over the Internet	iTunes, FeedBruner, iPodderX, WinAmp, @Podder

<sup>18</sup> Participative Web: user-created content' Report (2007)

	using syndication feeds, for playback on mobile devices and personal computers	
Social Network Sites	Sites allowing the creation of personal profiles	MySpace, Facebook, Friendster, Bebo, Orkut, Cyworld
Virtual Worlds	Online virtual environment.	Second Life, Active Worlds, Entropia Universe, Dotsoul Cyberpark and World of Warcraft
Content or Filesharing sites	Legitimate sites that help share content between users and artists	Digital Media Project

### 1.6. Monetisation and recent acquisitions of user-generated content

Business models for monetisation of user-generated content 19

Voluntary donations	'donate' button: the user makes the content freely available but would solicit donations from users.	Global Voices Online
Charging viewers for services	<p>Sites may charge those viewing UGC, whereas the posting of content is free</p> <ul style="list-style-type: none"> <li>• Pay-per-item model: In that scenario, users make per-item (micro)-payments to UGC platforms or to the creators themselves to access individual pieces of content., for instance, offers</li> <li>• Subscription model: This model would entail consumers paying to subscribe to services offering UGC, in particular for enhanced hosting and other services for one's own content and access to others content.</li> </ul>	iStockphot (photographs, illustrations and stock video from its user-generated stock for USD 5 each)
		Lulu.tv. Users pay for the service provided by the site, but they are also remunerated on the basis of the popularity of their content (see later discussion on this point). FreeTv (France) users pay for the UGC content via their usual ISP or cable subscription
Advertising-based models	<ul style="list-style-type: none"> <li>• Advertising is often seen as a more likely source of revenue surrounding UGC and a significant driver for UGC.</li> <li>• Many UGC platforms such as Fanfiction.Net are relying on services to drive advertisement revenues (e.g. Google AdSense, Microsoft, or the service provided by the UGC hosting site itself such as FeedBurner Ad Network for blogs).</li> </ul> <p>Increasingly branded channels. have been launched on UGC platforms where users can view content from a special brand or media publisher</p>	In August 2006, Google agreed to deliver at least USD 900 million in ad revenue over three and a half years to News Corp. for the right to broker advertising that appears on MySpace and some other sites. Microsoft Corp. also recently agreed to be the exclusive provider of advertising to Facebook

<sup>19</sup> Participative Web: user-created content' Report (2007)

Licensing of content and technology to third parties	<p>Licensing content to third parties (e.g. television stations) may be a source of revenue</p> <p>Cooperation with third parties to share the content involve mobile carriers</p> <p>Commercial agreements with third parties to provide their technology to the latter</p>	<p>Verizon and YouTube .Watch on Mobile. service</p> <p>DailyMotion entering a commercial agreement with the French ISP Neuf</p> <p>Telecom to provide its video sharing service technology</p>
Selling goods and services to community	Selling items or services directly to their users.	CyWorld Shop

### Recent acquisitions of UGC platforms

In the beginning, most of UGC were non-commercial ventures with little or no revenues but supported by venture capitals. Their initial objective was not high revenues but a large user-base that than would allow them to sell their business at a later point. Thus, YouTube creators have raised \$3.5 million in 2005 and less than a year later YouTube was sold for \$1.65 billion; Fox Interactive acquired MySpace' parent company about a year ago for a \$580 million and today MySpace, is estimated to be worth \$15 billion in just three more years.

Table 3: Selected, recent acquisitions of UGC platforms<sup>20</sup>

Data	Acquire	Acquired	Type	Price in USD millios
Sept. 2005	News Corp	MySpace	SNS	580
Oct. 2005	Viacom/MTV	iFilm	Video	49
Aug. 2006		Sony Grouper	Video	65
Aug. 2006	Viacom/MTV	Atom Films	Games, films, animation	200
Sept. 2006	Yahoo	Jumpcut	Video editing	Undisclosed
Oct. 2006	Viacom/MTV	Quizilla.com	Text, quizzes, images	Undisclosed
Oct. 2006	Google	YouTube	Video	1580
Nov. 2006	Google	Jotspot	Wiki	Undisclosed

### 1.7. Economic and Social Impacts

<sup>20</sup> Participative Web: user-created content' Report (2007)

Economic impact include the increasing growth for ICT products, including the new types of tools and software to edit and publish content; flash and hard-drivers, consumer appliances as digital cameras, portable MP3 audio players and other devices for cross-platform applications.

Furthermore, UGC created the demand for ISP to provide premium Internet services as well as to extend further services such as hosting or mobile access.

Also, it provides opportunity for traditional media to “carter the long-tail”- for cross-promotions and discovery of new talents; there is also possibility for them to defuse UGC over their traditional platforms (TF1 in France)<sup>21</sup>. However, on a traditional media side UGC also provides sufficient revenue lost due the fact that UGC sites often host unauthorized content; also, general audience lost in a favour of the Internet has its negative consequences.

Furthermore, UGC provide opportunity for revenue share between UGC creators, site hosts or other agencies, including search-engines, that are involved in distribution and capitalization of UGC content. It is interesting to see, however, how new business initiatives similar to AttentionTrust that empower its users to amass their own traffic patterns and preferences by using a piece of “plug-in” software would change the “wikinomics” of further capitalization of UGC user base.<sup>22</sup>

Also, UGC contributes to various social changes.

First of all, the emergence of new digital technologies and full-professional tools inflate the field for user participation and enable the individual user or community based organization to be actively involved in production of media content, thus facilitate the change from “the former audience” to the co-media and co-developers. This change in the nature of communication and increased opportunity for self-expression and self-realization, in turn, re-enforce the individuals’ desire for self-realization as a citizen, thus strengthen citizenship engagement and politics.

Second, UGC also substantially contributes to more diverse set of content where in the accordance with “long tail” principle each type of content to find its niche audience.

Additionally, UGC improves educational mechanism and contribute to advanced level of ICT skills among young generation; as well as it promotes critical minds, creative attitudes and intellectual challenges that are beneficial for the development of its users and creators.

Last, but not least, UGC could benefit the State, given that it provides opportunity for PSB to include UGC and therefore re-gain young audience<sup>23</sup>. Also, UGC has a potential to fill “product gaps”

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<sup>21</sup> The Report.

<sup>22</sup> AttentionTrust has ‘an approach to turn the tables on Google and other big aggregators of personal information... Instead, users amass their own traffic patterns and preferences using a piece of “plug-in” software that runs inside a web browser. The resulting profile can then be deposited in an online vault, where interested parties can pay to see it’; or Agloco that ‘is based on a browser plug-in that tracks users’ online activity ...and promises to return 90% of ad revenue, sales commissions and other income to its users’. ‘Working the crowd’; [http://www.economist.com/search/displaystory.cfm?story\\_id=E1\\_RSGVJJN](http://www.economist.com/search/displaystory.cfm?story_id=E1_RSGVJJN);

<sup>23</sup> Scott. Lunt, ‘Towards a user generated content regime for Public Service Broadcasters in Europe’.(2006), Ofcom

identified in the discussion part of this paper and enhance the degree of citizen participation and their contribution to the practicing critical democracy.

## Part II: Further challenges in UGC policies.

### 2.1 Net neutrality: setting choice with users.

Today YouTube is one of the biggest websites in terms of consumed bandwidth and number of videos available: it hosts over six million videos, growing at about 20 percent every month; the videos take up 45 terabytes of storage corresponding to about 5,000 home computers; the content requires several million dollars' worth of bandwidth a month to transmit.<sup>24</sup> In the context of these data, it is understandable why ISP – Web2.0 relation was described as “The Virtuous Circle of Broadband Supply, Skills and Demand”<sup>25</sup>: “The growth of P2P file-sharing services has driven the content demand beyond supply and towards higher speed access, however, if networks and content providers cannot monetise their respective parts of the value chain, network effects can reverse into a vicious circle, in which neither content nor network can secure investment to provide service, and the inflexion points – at which investment in the lagging element is needed to prime the next phase of disruptive growth – become turning points instead.”<sup>26</sup>. The question is how regulatory policy would approach this dilemma?

#### End-to-end principle

The architecture of the Internet is “dumb” network that doesn't have any particular application in mind but simply receives packets of data, analyze the address and passes them to the next node without asking the questions about the sender of the packet, the recipient, or the content. Thus, the network itself does not think “but the applications at the ends may perform ‘intelligent’ functions”.<sup>27</sup> This was defined by L. Lessig as “end-to-end” principle: the most salient feature of the Internet architecture that “renders the Internet an innovation commons, where innovators can develop and deploy new applications or content without the permission of anyone else.”<sup>28</sup>

It has been argued that the end-to-end principle has been instrumental to the remarkable growth of the Internet since it allows for ‘completion on merits’ and render innovation and extension of the scope and quality of applications available on the Internet. The “end-to-end principle” is particularly fundamental to the development of Web 2.0 applications given that Web 2.0 applications by definition are based on architecture of participation and ability to harnessing of collective intelligence.

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<sup>24</sup>L. Gomes, ‘Will All of Us Get Our 15 Minutes On a YouTube Video?’  
[http://online.wsj.com/public/article/SB115689298168048904-5wWyrSwyn6RfVfz9NwLk774VUWc\\_20070829.html?mod=rss\\_free](http://online.wsj.com/public/article/SB115689298168048904-5wWyrSwyn6RfVfz9NwLk774VUWc_20070829.html?mod=rss_free)

<sup>25</sup> E. Lorentzen, Norwegian Ministry of Trade and Industry, for the OECD Working Party on the Informational Environment Panel; quoted in Rand Report.

<sup>26</sup> C. Marsden, J. Cave, E. Nason, A. Parkinson, C. Blackman, J. Ruter. Rand Report,  
<http://www.ofcom.org.uk/research/tv/reports/videoregulation/vidregexec.pdf>

<sup>27</sup> P. Ganley, B. Allgrove, ‘Net neutrality: a user's guide’.

<sup>28</sup> L. Lessig, ‘The future of ideas’, (2001), Vintage Books

## Net neutrality.

The net neutrality debate today is about: “whether the Internet should retain its end-to-end design or whether the operators, who own and control various aspects of the physical layer, should be permitted to ‘discriminate’ amongst the data that passes across their net-works by access tiering”<sup>29</sup>

L. Lessig was concerned that the ISPs should not be allowed to discriminate against particular types of content or services as it would lead to the “creative destruction” and hamper the innovation and investment in the areas involved.

Furthermore, the scholars such as Jonathan L. Zittrain expressed a fear that the PC could become the next “gatekeeper” and suggested to extend the net neutrality for something deeper as a generative network grid that “includes both PCs and networks rather than as an open network indifferent to the configuration of its endpoints.”<sup>30</sup>

## Access tiering

Access tiering is a practice of anti-trust nature that interferences with the net-neutrality principle as it implies an ability of network providers to prioritize over network traffic by restricting an access to content or specific services ( as a very extreme end); or by setting a different price for access depending on the nature of application or content in question. Advocates of net neutrality argue that the introduction of premium services could undermine the innovative culture of the Internet. “If the fast lane is the information superhighway, the slow lane will operate more like a dirt road,” wrote Meg Whitman, the boss of eBay, the leading internet auction site, in an e-mail to its users. “A two-lane system will restrict innovation because start-ups and small companies—the companies that can't afford the high fees—will be unable to succeed.”<sup>31</sup> Eric Schmidt, the boss of Google, took a similar stance: “Creativity, innovation and a free and open marketplace are all at stake in this fight.”<sup>32</sup>

As it was emphasized by P.Ganley<sup>33</sup>, from consumer prospective, access tiering differs from the user-led preferences as it places control in the hands of the network operators and not in users and can be exercised by operators for a number of reasons, some of those are summarised below:

First, operators need “pay for the pipe”. Operators can be driven by the cost of the investment placed on them due to the emergence of new applications as well as the increase in the number of users. The required next generation networks come at an enormous cost and operators argue that they should be allowed to “share the cost.”<sup>34</sup> While stating that they are not going to block nor

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<sup>29</sup> P.Ganley, B. Allgrove, ‘Net neutrality: a user’s guide’.

<sup>30</sup> J. Zittrain, ‘The Generative Internet’, Harv. Law Review (2005-2006)

<sup>31</sup> “Changing the rules”, Economist, [http://www.economist.com/surveys/displaystory.cfm?story\\_id=7995271](http://www.economist.com/surveys/displaystory.cfm?story_id=7995271).

<sup>32</sup> “Changing the rules”, Economist, [http://www.economist.com/surveys/displaystory.cfm?story\\_id=7995271](http://www.economist.com/surveys/displaystory.cfm?story_id=7995271).

<sup>33</sup> P.Ganley, B. Allgrove, ‘Net neutrality: a user’s guide’.

<sup>34</sup> Ivan Seidenberg, CEO of Verizon, quoted in ‘Changing the rules’. Economist, [http://www.economist.com/surveys/displaystory.cfm?story\\_id=7995271](http://www.economist.com/surveys/displaystory.cfm?story_id=7995271)



interfere with service offered today, operators want to be allowed to fully exploit their interest by extra charging all premium services that are stand above “basic efforts” level. Operators complain that content services are getting a “free ride” while it is them, the providers, who are always making the investment to guarantee the future of network quality.<sup>35</sup> The counter-argument from the content side is two-fold: first, the end users, content providers and service providers have already contributed to network investment via subscription and bandwidth fees; second, that operators are seeking to get a “free ride” on the content created by others while cable companies, for instance, pay for the content they deliver: What makes them think that they are going to charge Google, as opposed to Google charging them?”<sup>36</sup>

Furthermore, due to increasing convergence of content and communications market, operators might be interested to favour their own content over the content of other rivals. Competition law alone might prove to be insufficient in addressing a threat that was described by L.Lessig as control leverage that occur when control from the physical layer leverages across both content and code layers.<sup>37</sup> Thus, technological convergence may allow for “vertical integration ...that goes with several companies takes control of single access point.... and exercise gatekeeping restrictions causing the end of the open nature of network”.<sup>38</sup>

### **Regulatory challenge in the net-neutrality debate.**

As it was argued by Y. Benkler, the Internet and technological development changed what was previously passive consumers by enabling them to participate in the “production of their information environment”.<sup>39</sup> This user-led involvement in creation and dissemination of content provides for significant social benefits as democratic participation, freedom of expression or individual autonomy. However, there are regulatory choices at all layers of the information environment—the physical infrastructure, logical infrastructure, and content layers—that threaten to re-enforce the structural regulation of the mass media model and restrict the evolution into user-centric system. In order to secure the public interest behind the user-centric system, Y. Benkler concluded, we need to develop a system that “develop and sustain commons, wherever possible, in the resources necessary for the production and exchange of information, and that we design provisions enabling access to the resources that cannot be sustained as commons.”<sup>40</sup>

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<sup>35</sup> P.Ganley, B. Allgrove, ‘Net neutrality: a user’s guide’.

<sup>36</sup> Changing the rules’, Economist, [http://www.economist.com/surveys/displaystory.cfm?story\\_id=7995271](http://www.economist.com/surveys/displaystory.cfm?story_id=7995271).

<sup>37</sup> L. Lessig, ‘End-to-End. Preserving Architecture in Broadband Era’ where L. Lessig was arguing against bundling services together as in a case of cable operators/telecom (i.e AT&T/Time Warner) who can impose whatever conditions on their customers’; also ‘The future of ideas’, (2001), Vintage Books

<sup>38</sup> A.Murray, ‘The regulation of cyberspace’ (2007) Routledge Cavendish Books

<sup>39</sup> Y. Benkler ‘From Consumer to Users: shifting the deeper structure of regulation towards sustainable commons and user access.’, <http://www.law.indiana.edu/fclj/pubs/v52/no3/benkler1.pdf>

<sup>40</sup> Y. Benkler ‘From Consumer to Users: shifting the deeper structure of regulation towards sustainable commons and user access.’, <http://www.law.indiana.edu/fclj/pubs/v52/no3/benkler1.pdf>

The net neutrality debate and regulatory policy regarding the access tiering is one of these choices . Thus, to secure access to the resources that cannot be sustained as commons, we need to return back to “The Virtuous Circle of Broadband Supply, Skills and Demand” and recognize that there is a need to find a compromise between user led applications of UGC and infrastructure investment burden of ISPs.

As one of the possible solutions regarding how to minimize “the negative effects that this forced migration will inevitably produce”, P.Ganley proposes that regulatory mechanism should put the decision on tiering choices in the hands of users rather than operators and “it is these end users who should be the focus of any regulatory enforcement of net neutrality”<sup>41</sup>. These would help to ensure that deviations in network performance are based on the needs of end users rather than the needs of a particular application provider.

The particular measures suggested by P. Ganley include:

- 1) Restricting operators from discriminating amongst particular application but allowing them to provide difference broadband packages to be selected by user;
- 2) Requiring operators to provide a clear description between those packages, including a description between download and upload capabilities;
- 3) Prohibiting operators from censoring content (no monitoring obligations). The measures demonstrated above give users control of “the shift from a neutral Internet to a tiered space” and seem to be the optimal solution to net neutrality challenge from UGC prospective.

## **2.2. Securing autonomy of UGC participation and access.**

“We need a better vision of media pluralism. There has to be recognition that pluralism, especially as we move towards Media 2.0, cannot be limited to the question of concentration of ownership. We need to look at both external pluralism of media and internal pluralism within individual media companies. Citizens that have access to many sources and voices can avoid the effect of dominant opinion forming powers.”<sup>42</sup>

UGC is in many ways a form of personal expression and free speech. For instance, a blog is seen as to supplement to the formal channels of representation and can be compared to protest<sup>43</sup>; participation in protest in its turn can be viewed as a form of “active engagement in the life of the

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<sup>41</sup> P.Ganley, B. Allgrove, ‘Net neutrality: a user’s guide’.

<sup>42</sup> Viviane Reding, Global Digital Magazine Media 2.0 Conference, 14 March 2007

<sup>43</sup> J. Rowbottom, ‘Media Freedom and Political Debate in the Digital Era’ (2006) The Modern Law Review

community”<sup>44</sup>. Through a form of self-presentation, UGC enhance the metaphor of the “marketplaces of ideas” since it implies not just atomized consumption of content but creation and active participation. Thus, an important policy objective may be to secure the sovereignty of participation and avoiding the privatisation of freedom of expression and communication that can occur via censorship or excising control over tools required by a user for his involvement. As it was outlined by J. Rowbottom, while IT development enable greater user participation, there still are on-line “gatekeepers who are in a position to limit the extent to what freedom of expression and participation can occur”<sup>45</sup>. From the prospective of broader on-line community rather the sole UGC sector, “on-line gatekeepers” were summarized by J. Rowbottom as traditional media; bloggers and search engines given that all three players are in position to influence the success of an online speaker in reaching his audience.

Traditional media, for instance, could continue to “command audience” and re-enforce its favourite choices due to information abundance created need for “trusted media” as a navigation source that reflects the actuality of alternative media references. Also, given the dependence of “non-traditional” media on the traditional media coverage, the popularity of certain “citizen journalism” reviews could be affected accordingly its relevance to the traditional media topics.

Apart from the traditional media, the new generation of “gatekeepers” such as bloggers and search engines are also in a position to effect the access of audience to a particular source of content. Bloggers because they decide which other sites to link to their blog and therefore the “star” blogger will gain some characteristic of the established media; search engines because the success of the Internet content depends on the level of priority given to it by the search engine, thus success of an on-line speaker will depend on whether these search facilities list the site.

Furthermore, in addition to on-line “gatekeepers” discussed by J. Rowbottom, the following “empowerment” tendencies should be mentioned due to their ability to increase participation barriers for UGC creators.

First of all, technology and intellectual property based controls re-enforce the strength of existing rights holders. In particular, big-leaguer traditional media players very often have copyright in the content what represent interest- or necessity- for either UGC creators (derivative works). The conditions of license agreements combined with already existing DRM controls and limited fair use rights will determinate playing field for both content creators <sup>46</sup> Although this paper does not seek to assess the copyright issues raised by UGC, it is worth to mention that the assignment of rights from the right holders can be complicated by number of reasons, in particular the costs involved or the

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<sup>44</sup> Brokdorf case; H. Fenwick’ Media Freedom under the Human Rights Act (2006) Oxford press.

<sup>45</sup> J. Rowbottom, ‘Media Freedom and Political Debate in the Digital Era’ (2006) The Modern Law Review

<sup>46</sup> One business models against other , e.g YouTube v Joost as business choice from Viacom.

inability to identify and locate the author of the original work, and the appropriate price settled for the content in question<sup>47</sup>. While the first issues can be address by new solutions such as the creation of clearing houses/centres for the attribution of rights to UGC and other creators; the later is subject to rights owner corporate considerations only. Therefore, there is a possibility that traditional media may propose purposefully prohibitive and indicative licensing structure. Additionally, if there is a change to the current compromise of NTD regime and ISPs with regard to monitoring obligations<sup>48</sup>, there is a chance that cost of monitoring and of DRM implementations would have significant impact on the sUGCess of small, independent UGC host sites opposed to UGC sites run by cross-market media empires. Thus, the combined costs of DRM implementation together with prohibitive licensing structure could result in “gatekeeping” role of intellectual property law.

Finally, the assessment of currently existing user agreements let us to assume that users do not expressively care of particular commitments framed in those usually click wrap user contracts and seem to be trouble-free in making trade-offs in order to make their work available<sup>49</sup>. Thus, there is no reason to exclude a possibility that once those user agreements won’t allow a content host to exercise an editorial control over all content distributed via its platform. Therefore, similar to a blogger who decides what links to post on his blog, the UGC host will decide what types of contents he wants to include. Given that UGC hosts are often driven by goals of revenue and audience maximalization, it is possible that they would rather make a choice in favour of the popular rather than “minority” content. This threat has already been addressed under “Changing media summit 2007” in the form of the topic “How do publishers retain the richness and diversity of their readers’ voices, yet maintain their own editorial tone and integrity?”<sup>50</sup> Drawing these reasons together, it appears logical if we consider UGC hosts to be potential “gatekeepers” similar to “star” bloggers but with the main difference that while star “blogger” is usually driven by personal views, UGC hosts driven by their corporate interests.

To conclude, in order to achieve what was defined by Viviane Reding as a “better vision of media pluralism”<sup>51</sup>, media regulation should emphasise democratisation of access to media outlets and ensure that neither the design or architecture of digital technology, nor the strength of private or corporate power restrict one’s ability to participate in politics and media production.<sup>52</sup> This would help to secure autonomy of UGC participation and contribute to democracy serving media outcomes.

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<sup>47</sup> report

<sup>48</sup> Lessig, L. “Make Way for Copyright Chaos,” The New York Times, March 18, 2007

<sup>49</sup> In many of current UGC users agreement, users agree that they give UGC host a licence to use their content, without remuneration, and even licence it to the third parties.

<sup>50</sup> Media Guardian, Changing Media Summit 2007, March 2007

<sup>51</sup> V. Reding, ‘The future of content markets: business cannibals or media partners’, Hannover, March 2007

<sup>52</sup> J. Rowbottom, ‘Media Freedom and Political Debate in the Digital Era’ (2006) The Modern Law Review

## 2.3 Enhancing the degree of public elevation.

While aiming to enhance the participation opportunities for User Generated Content users, regulators should focus not just on the providing an unobstructed communications, but also consider aspiration to enrich diversity and cultivating the potential of UGC. This is special challenging for video-based applications given that “quality” video content may require investment or skills that not always available for UGC creators. However, certain types of video based UGC application have a potential to fill that E. Goodman referred to as a “product gap ” in her assessment of content drifts in the digital mediascape.<sup>53</sup> In particular, she argued that despite new efficiencies in media production and distribution cost, digital distribution models will be “benefiting some of audience constituencies, but not others.”<sup>54</sup>

Certain type of content that is demanded by smaller audience will probably continue to be under-produced. Examples include “documentary films and investigative journalism, new commentary and reporting .....”<sup>55</sup> Further, it was argued by E. Goodman, that content abundance doesn’t guarantee the consumer satisfaction but rather led to attention scarcity and burdens “audience’s already strained attention to make sense of information”<sup>56</sup>. The effect is similar to one of the arguments pursued by C. Sunstein, who argued that the Internet reduce exposure to the content that builds solidarity.<sup>57</sup> Thus, it was suggested by E. Goodman, that public media policy should focus on two clear goals: first, subsidies should be targeted to respond the narrow market failures by supporting the production of content that will be under-produced in digital era; second, the media policy must boost consumption of critical engagements with content support. This might include the aim to “promote content using navigation tools of digital media, the production of new forms of content such as virtual reality games, or the sponsorship of peer-produced content.”<sup>58</sup>

Sponsorship alternative seem to be especially appealing for video-based UGC applications since while video based UGC has the potential to fill “documentary films and investigative journalism, new commentary and reporting...” i.e. the production gap discussed above, the production of high quality video content requires significant cost. It, therefore, might be that C. Sunstein argument for state subsidies to promote civil duty and public interest in the relation to websites, can re-gain its

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<sup>53</sup> E. Goodman, ‘Media Policy out of Box: Content abundance, attention scarcity, and the failures of digital markets’, Berkeley Tech. L. Review (2004)

<sup>54</sup> E. Goodman, ‘Media Policy out of Box: Content abundance, attention scarcity, and the failures of digital markets’, Berkeley Tech. L. Review (2004)

<sup>55</sup> E. Goodman, ‘Media Policy out of Box: Content abundance, attention scarcity, and the failures of digital markets’, Berkeley Tech. L. Review (2004)

<sup>56</sup> E. Goodman, ‘Media Policy out of Box: Content abundance, attention scarcity, and the failures of digital markets’, Berkeley Tech. L. Review (2004)

<sup>57</sup> C. Sunstein , Republic.com (2001) Princeton University Press

<sup>58</sup> E. Goodman, ‘Media Policy out of Box: Content abundance, attention scarcity, and the failures of digital markets’, Berkeley Tech. L. Review (2004)

relevance in the relation to video-based UGC applications given that significant costs, production complexity and reliance of UGC content on popularity based advertisement revenues does not allow us to conclude that this types of video content would be produced otherwise.

Among state subsidies, in order to enhance quality of UGC, Scott L. Lunt proposed the different co-operation models with PSB that would include:

1) Optional professional assistance provided by the PSB;

2) Offering public domains of the PSB for the further re-use in UGC content.<sup>59</sup> Currently different forms of production assistance and quality control are already provided by number of PSB and community Channels.<sup>60</sup>

To conclude, decentralized approach to content production and a notion of self-fulfilment should be considered as the most salient feature of UGC as opposed to its non-commercial or non-professional elements. Thus, regulators should not exclude the support to the decentralised content production of UGC and should focus on the professional growth of “amateur creators” given that UGC could fill “under-produced” content gaps, therefore assist in building solidarity and critical function of democracy. Such “professional” development would allow video-based UGC extend its democratic value from the current one which is based mainly on self-expression to the one that is based on cultivating contribution to overall media output.

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<sup>59</sup> Scott L. Lunt, ‘Towards a user generated content regime for PSB in Europe’. (2006);

<sup>60</sup> For instance, OpenChanel ( <http://www.communitymedia.se/cat/index.htm> ) or BBC provides access to facilities, training and the means of transmission in the interest of levelling of barriers and allowing greater freedom of expression and participation.

### 3.1. Introduction

#### 3.1.1 European Union New Regulatory Framework (NRF) and Liability of ISPs.

Historically, different service providers have delivered the content using distinct networks: television over terrestrial broadcasting stations; telephone calls over telephone networks; cable television over cable networks. The regulation of content and content services was medium technology-specific depending on the medium over which content is conveyed and evolved into two distinct regimes: the television broadcasting sector which is regulated by the TWF directive and the information society sector which is regulated by NRF framework. The main aim of TWF directive was to provide content requirements in the relation to the broadcasting services<sup>61</sup>; while the main objective of NRF is to regulate the electronic communication services; networks and associated facilities.

Whether a service constitutes ECS or content services depend on whether a service's primary concern is the carriage of signals (ESC) or the provision of materials or content. Information society service was defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"<sup>62</sup> and excluded commercial services and content delivered over the electronic communication network.

Therefore, the distinction of whether content constitutes "television broadcasting" or "an information society service" is important for two reasons: two regimes impose different content requirements where the range of content requirements imposed by TWF is opposed to the absence of any general obligation relating content within the NRF framework.<sup>63</sup>

Also, two regimes apply different liability models: ex ante liability of broadcaster as opposed to ex post, indirect, liability of network providers that apply in the accordance with both specific and general immunity provided that the ISPs meet the conditions required either of E-commerce or InfoSociety directives.

In particular, the E Commerce Directive defines "information society services" in Recital 17 as:

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<sup>61</sup> Article 1 under a. of the TVWT Directive

<sup>62</sup> Art 1(a) 'information society services': services within the meaning of Article 1(2) of Directive 98/34/EC as amended by(1) OJ C 23, 28.1.1999, p. 1. Directive 98/48/EC;

<sup>63</sup> I. Walden , J. Angel, 'Telecommunications Law and Regulation' (2005) Oxford Press ; Also, [http://ec.europa.eu/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/l\\_10820020424en00210032.pdf](http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/l_10820020424en00210032.pdf)

*“any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.”<sup>64</sup>*

Given that intermediary’s liability for the information content originating from a third party can apply in each type of activities carried out by ISP (copying, possession, transmission), the E Commerce Directive has one of its objective to specify where ISPs are and that they are not liable for the material included in services provided. Therefore, Articles 12 (Mere Conduit); Article 13. (Caching ); Article 14. (Hosting ) and Article 15 ( No monitoring obligations) are introduced to provide immunity for ISPs that take merely passive role in operating of a communication network and have neither control or knowledge over of the information that is stored or transmitted. However, to qualify for immunity, ISP has also to comply with requirements of removing and disabling access procedures i.e. where ISP disable, ex post upon request, an access to unlawful or indecent content.<sup>65</sup> In particular, the E Commerce Directive defines this obligation in both Articles 13 and 14 as:

*“the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information”*

#### *Article 12*

##### *"Mere conduit"*

*1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:*

*(a) does not initiate the transmission;*

*(b) does not select the receiver of the transmission; and*

*(c) does not select or modify the information contained in the transmission.*

*2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.*

*3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*

#### *Article 13*

##### *"Caching"*

*1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:*

*(a) the provider does not modify the information;*

<sup>64</sup> [http://eur-lex.europa.eu/pri/en/oj/dat/2002/l\\_201/l\\_20120020731en00370047.pdf](http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf)

<sup>65</sup> In the USA, there is appeal procedure of ‘put back’ to reduce the effect of ISP being substituting their views of illegal and harmful instead of trained legal judgment. The same approach was recommended to be adapted in the E Commerce by Ch. Marsden in ‘Co and self-regulation in European Media Market and Internet sectors: the result of Oxford study.’ (2004) Communications Law.



- (b) the provider complies with conditions on access to the information;*
  - (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;*
  - (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and*
  - (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.*
- 2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.*

#### *Article 14*

##### *Hosting*

- 1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:*
- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*
  - (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*
- 2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.*
- 3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.*

#### *Article 15*

##### *No general obligation to monitor*

- 1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*
- 2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.*

In relation to the copyrighted works, the similar effect is reached via Article 5 of Information Society Directive that provides for specific copyright infringement immunity for ISP where copying made by ISP for the purpose of transmission is temporary and has its sole purpose in a transmission of the work.

### 3.1.2 Rationalities for broadcasting regulation

“Television Without Frontiers” had its legislative basis in Articles 47(2) and 55 of the EC Treaty which allow harmonization in order to facilitate free movement of services in the internal market.<sup>66</sup> Thus, the core objective of the directive is defined by the European Commission as

“Essential internal market policy, and is govern by internal market objectives of freedom of movement for good...and the freedom to provide services”. ( EC 2003: 8).

The Scope of ‘Television Without Frontiers’ Directive :

- “County of origin” principle: in order to broadcast through the European Union, broadcasters only need to be regulated in the country where substantial activity takes place. Member States should ensure that all television broadcast transmitted under its jurisdiction should comply with the law applicable to television broadcasting services; as well as guarantee the freedom of reception and retransmission of a television broadcast lawfully transmitted from other Member States. However, Article 2 of the TWF allowed Member States to derogate from the obligation of “not to restrict retransmission” and allowed Member States to prohibit the service broadcasted from another state provided that content might service to “seriously impair the physical, mental or moral development.”(Art 22). The Directive, however, does not defined the terms “seriously impair the physical, mental or moral development” and therefore Article 2 was seen as an obstacle to “meaningful harmonisation” given the cultural difference that exist between States.<sup>67</sup>
- Protection of certain events of major nation importance on free television (Art 3).
- Excluding news, special events, games, advertising and teletext, broadcasters should transmit according EU quotas: more than 50% of European works (Art 4), more than 10% of Independent producers (Art 5). However, M. Feintuck, theoretically questioned the legal basis for Art. 4 and 5 given that the TVWD has its legal basis in the EC Treaty that concerned with freedom of services within EU and “nothing in the EC Treaty would suggest ...that the Community had competence to act in the field of culture.”<sup>68</sup>
- Rules on advertising, sponsorship
- Protection of Minors: broadcasts should not contain programmes which might negatively affect children (Art 22); neither it should contain any incitement to hatred on grounds of race, sex, religion or nationality (Art 22 a)
- Anyone defamed on TV should have a right to reply (Art 23)

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<sup>67</sup> M. Feibtuck and M. Varney, ‘‘Media Regulation, Public Interest and the Law’ (2006) Edinburgh University Press

<sup>68</sup> *ibid.*

Thus, as opposed to the ISP model discussed in section 3.1.1, the liability of broadcaster occurs ex ante by the content packager or broadcaster at, or prior to the point of transmission through both its compliance with special regulatory requirements and its use of ‘watershed’ and self-censorship restraints as a requirement for the offence-avoidance.<sup>69</sup>

The traditional reason for a higher level regulation for broadcasting is premised largely upon the “extra power attributed to broadcasting as a result of its accessibility, immediacy and intrusiveness”<sup>70</sup> and were identified by Eric Barendt as following:<sup>71</sup>

1. Frequency scarcity: Barendt identified three types of scarcity: actual, artificial and economic scarcity. The need to ensure undisturbed and sufficient access for state services initially formed justification for state intervention as opposed to print media.
2. Airwaves are public resources among other public utilities.
3. The pervasiveness of broadcast media, especially to children and the vulnerable.
4. The balance against an unregulated press: since press is unregulated, broadcasting have been seen as balance power that provide for diversity and plurality in media outcome

### 3.1.3. Changes brought by convergence

Therefore, in order to determine what requirements and what liability should apply to a particular type of audiovisual content, it is important to be able to distinguish whether a specific service constitutes “television broadcasting” or an “information society service”.

The technological development brought convergence and made it possible for the different media networks to carry essentially similar kind of content, that in turn lead to “the introduction of new technologies and new communications and information services and the prospects for progressive disappearance of technology boundaries between broadcasting, telecommunications and informatics”.<sup>72</sup> New audiovisual services that usually involve a greater degree of user choices and control options, make it more difficult than in the formerly separate sectors to make a distinction between “push” or “pull” nature of content therefore clearly differentiate between a “television broadcasting” and “information society” services.<sup>73</sup>

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<sup>69</sup> H. Fenwick ‘Media Freedom under the Human Rights Act (2006) Oxford press.

<sup>70</sup> *ibid.*

<sup>71</sup> E. Barendt, ‘Broadcasting law: a comparative study’, (1993) Clarendon Press

<sup>72</sup> Ad van Loon ‘The end of broadcasting era. What constitutes broadcasting and why does it need to be regulated’ Journal of Computer, Media and Telecommunications Law (2004)

<sup>73</sup> *Mediakabel BV v Commissariaat voor de Media* (case C 89/04): so called ‘near on-demand services’ where the ECJ took the view that ‘a pay-per-view television service ... which comprises only of programmes selected by the broadcaster and is broadcast at the times set by the broadcaster, cannot be regarded as being provided on demand’. Thus, Filmtime was defined as a ‘linear –service’ and had to comply with the “Euro-Quotas” requirements.

Therefore, a general difficulty and uncertainty of differentiation between linear and non-linear service, among difference in playing field it caused, led regulators to believe that after being a driving force for re-regulation of telecommunications and e-commerce, convergence in network and in consumer equipment has led to a need to converge the way in which different media and different delivery channels should be regulated. Following an expressive debate, in May 2007 the European Parliament and the Council of Ministers have reached agreement on the main aims of the Commission proposal to modernize the rules governing the audiovisual service industry.<sup>74</sup> It was stated that the new Audiovisual Media Services without frontiers Directive (AVMS) “will allow the audiovisual sector confront the profound changes it faces to accommodate technological and market developments, and changing viewing habits resulting from convergence.”<sup>75</sup> However, the criticism expressed upon the first draft of the AVMS Directive, lead us to doubt the practicability and appropriateness in the relation to the extending broadcasting regulation per se.

The essence of the main criticism expressed in the relation to the first draft of the AVMS Directive was the extension regulation into to the new media services which were previously unregulated or already regulated by the E-Commerce Directive. The opposition based their argument on the ambiguity of the concepts and the legal uncertainty this will create. It was also argued that the proposed Directive will fail to promote either single market or completion, but rather it would “strengthen the position of incumbent service providers and make the entrance relative to new entrants by making entry more costly”. Furthermore, the criticism was expressed regarding the definition of “media service provider” that allowed for inclusion of video blogs and online gaming content.<sup>76</sup>

Although the second proposal of AVMS seeks to clarify the definitions used, including the concept of editorial responsibility; limits the scope of the “audiovisual service” to that television-like non-linear audiovisual services; and excludes the online games and search engines, thus definitely being a compromise, the corner stone of the criticisms expressed in the relation to the first draft still seems to be valid. It still includes non-linear service that means that “it’s unlikely that this new directive will really achieve most of its goals, particularly because of the global nature of the Internet”.<sup>77</sup>

The next part of this paper seeks to evaluate the main criticisms expressed in the relation to the first proposal. In particular, it focus on the key issues identified in the Rand Report regarding the indirect impact of the first proposal of the AVMS for the development of information and communication technology(ICT) and the creative content sectors . For the purpose of this discussion the following topics also will be reviewed:

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<sup>74</sup> ‘Political Agreement reached on AVMS Directive’. ( 2007) EU Focus

<sup>75</sup> Press release of the new AVMS Directive.

<sup>76</sup> The United Kingdom briefing to the UK members of the European Parliament , quoted in N. Good ‘European Reaction to the proposed new audiovisual services Directive’, Communication Law, (2006)

<sup>77</sup> <http://www.ofcomwatch.co.uk/2007/05/europe-agrees-new-audiovisual-media-services-directive/>

I. Rationalities for media and broadcasting regulations; II. “Television Without Frontiers” Directive. III. The proposed TVW extension: the first proposal of AVMS; IV. The reaction to the first proposal of the AVMS Directive; V. The second proposal of Audiovisual Services Directive.

### **3.2 The relevant definitions of television broadcasting**

#### **3.2.1 Under “Television Without Frontiers Directive”:**

Article 1 under a. of the TWF Directive, ‘television broadcasting’ is defined as:

(a) ‘television broadcasting’ means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services;

Article 1,b) of the Directive, ‘Broadcaster’ defined as:

‘broadcaster’ means the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties;

(c) ‘television advertising’ means any form of announcement

#### **3.2.2 The proposed TVWT extension: Audiovisual Media Services Without Frontiers (AVMS) Directive.**

##### **Grounds for and objectives of the First proposal of Audiovisual Media Services Without Frontiers (AVMS) Directive.**

‘The market for European television services has changed dramatically through the convergence of technologies and markets. “Traditional” television broadcasting services remain regulated on the basis of the regulatory approach of the 1980’s and 1990’s. While this approach has succeeded in spectacularly developing the audiovisual market in the European Union, it is no longer adapted to the increasing degree of choice of consumers of audiovisual services in the digital age. At the same time, broadcasters have to compete increasingly with other linear services on other platforms and non-linear (on-demand) services that offer the same or similar audiovisual media content, but are subject to a different regulatory

environment. This creates a non-level playing field in the way content is delivered. In line with the principles of “better regulation”, therefore, a fresh approach is required.<sup>78</sup>

In addition to creating a “fair regulatory framework and a level playing field” for all audiovisual services, the Commission defined another key issue required to be addressed by regulators as:

“the key issue that regulators – both national and European – need to address today is that rules devised for one-to-many broadcasting are being rendered obsolete by the shift to one-to-one, on-demand services. For the European Commission, according to our principle of better regulation, enhanced end-user control means less need for regulation, which is why the heart of our proposal for a new, modernised Television without Frontiers directive is a substantial deregulation of audiovisual rules.”<sup>79</sup>

This means that the AVMS seek to regulate not only licensed broadcasters but a very broad range of stakeholders who formerly were unregulated or regulated by the E Commerce Directive.<sup>80</sup>

#### **The key definitions of the first proposal of Audiovisual Media Services Without Frontiers (AVMS) Directive.**

Under the proposed AVMS, the Commission extended the scope of the TWF directive to cover all AVC, regardless the method of delivery. Thus, the AVMS included all media services offered over the Internet, telecoms networks, terrestrial, cable, satellite networks, or any other network whose purpose is the provision of services defined by AMVS as “audiovisual media service”.

Article 1(a) of the proposed Directive defines “audiovisual media service” as:

“a service as defined by Articles 49 and 50 of the Treaty the principal purpose of which is the provision of moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council” (Art. 1 (a)).<sup>81</sup>,

Therefore, the Directive covered a series of video- or audio-enhanced user-led innovations distributed via networking platforms such as YouTube, Myspace or Bebo<sup>82</sup>.

The definition of “audiovisual media service”, however, does not cover all audiovisual services:

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<sup>78</sup> [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0646en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0646en01.pdf)

<sup>79</sup> ‘Why Europe needs to modernise its TV without Frontiers Directive’. Press release. [http://ec.europa.eu/information\\_society/services/doc\\_temp/tvwf-sht1\\_en.pdf](http://ec.europa.eu/information_society/services/doc_temp/tvwf-sht1_en.pdf)

<sup>80</sup> Rand Report

<sup>81</sup> OJ L 108, 24.4.2002, p. 33.

<sup>82</sup> Rand Report

- Non-economic activities ( Recital 13):

The definition of audiovisual media services covers all audiovisual mass-media services, whether scheduled or on-demand. However, its scope is limited to services as defined by the Treaty and therefore covers any form of economic activity, including that of public service enterprises, but does not cover non-economic activities, such as purely private websites.

- Private correspondence and audiovisual content not intended for distribution (Recital 14):

The definition of audiovisual media services covers mass media in their function to inform, entertain and educate, but excludes any form of private correspondence, such as e-mails sent to a limited number of recipients. The definition also excludes all services where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner; such as animated graphical elements, small advertising spots or information related to a product or non-audiovisual service.

- Electronic version of newspapers and magazines ( Recital 15)

A ‘media service provider’ was defined in Article 1 (b) as:

“the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised”;

A “**non-linear service provider**” was defined in Article 1 (e) as

“an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider’

Thus, for the business models such as YouTube which support the insertion of advertising into the most popular blogs and videos, any content producers who chooses to accept advertising would be a subject the AVMS as non-linear provider, even though the advertising is chosen by the site host’.<sup>83</sup>

A “**linear service provider**” was defined as

“where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule.”

Liner services included all types of “push” content regardless the platform of transmission; it also included all “recorded and therefore delayed”<sup>84</sup>linear content, whether recorded on Personal Video

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<sup>83</sup> Rand Report

<sup>84</sup> Rand Report

Recorder or other means. It also included near-on-demand services;<sup>85</sup> and also “it appears that a weekly subscription to a video blog with advertising support could be classified as linear broadcasting”.<sup>86</sup>

Indepen Report provided the following Figure to summarize the main AVC services cover by the scope of the first AVMS proposal<sup>87</sup>

Platform	Linear Services	Non-Linear
	‘where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule’	‘an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider’ Services
Traditional TV:  Terrestrial broadcast;  Satellite  CATV	Publicly funded TV  Advertising Funded TV  Pay TV  NVOD  Radio over TV Platform	VOD  Services for download for later consumption  Interactive services
IPTV networks	Pay TV  Pay per view	VOD  Interactive services
Internet -radio	Simulcast  Launchcasts	PODcasts  Program/Music Downloads
Internet-TV	Simulcast  TV is streamed over the Internet for immediate viewing using a ‘best effort service’.	Services for download to PVR  POD casts in future  The downloading the information solves the quality service problem inherent in the streaming services.  A ‘user pull ’ content include: <ul style="list-style-type: none"> <li>• Content from mainstream TV channels</li> <li>• Specialised content aimed at niche market segments</li> <li>• Non-commercial content</li> </ul> The target market for the services mainly consist of:

<sup>85</sup> Mediakabel BV v Commissariaat voor de Media

<sup>86</sup> Rand Report pp 75

<sup>87</sup> Indepen, 2005



		<ul style="list-style-type: none"> <li>• Technically literate broadband users</li> <li>• Niche markets/ethnic minorities members</li> <li>• Niche interest groups</li> </ul>
Mobile cellular network	Video streaming Mobile visual radio	Download video clips Interactive services
Mobile TV network	Pay TV Pay per view	Download to mobile terminal
Radio broadcast	Publicly funded radio FTA advert funded radio Mobile visual radio	Services for download to storage devices

Based on this Figure, we can conclude that there is co-existence of various types of differently regulated content shared via one single platform. Thus, PVRs and PCs which will contain three types of content: recorded, regulated linear TV content; downloaded, co-regulated non-linear VOD content; any other such as unregulated content.<sup>88</sup>

#### Basic /Detailed tier distinction

In establishing the exact degree of regulatory obligation, the Commission intended to take account of the principle of proportionality by introducing the differentiated degree of regulation according to its either “pull” or “push” nature. Such differentiated approach reflects differences in user choice and control and the likely impact to society; as well as the cost of regulation compared with the benefits of its enforcement.<sup>89</sup> Thus, “non-linear content” is to be subject only to minimum rules of the “basic tier” regulation while linear services would be subject to both detailed and basic tiers of regulation.

The distinction between “linear” and “non-linear” was summarized in Indepen Report as following:

Tier	Linear services	Non linear services	Rules applying in tier
Basic rules	Yes	yes	<ul style="list-style-type: none"> <li>• Protection of minors and public order (Arts 22, 23)</li> <li>• Respect for human dignity (Art 12)</li> <li>• Identification of advertisement (Art 10)</li> <li>• Ban on tobacco and</li> </ul>

<sup>88</sup> Rand Report

<sup>89</sup> *ibid.*

			<p>prescription drug advertisement (Art 13 and 14)</p> <ul style="list-style-type: none"> <li>• Right to reply (Art 23)</li> <li>• Identification of content provider</li> </ul>
Detailed rules	Yes	no	<ul style="list-style-type: none"> <li>• Quotas on content (Art 4 and 5)</li> <li>• Advertisement restrictions (Art 11, 15. 17 and 18)</li> <li>• Access to events of national importance (Art 3a)</li> <li>• New short news reporting right (Art 3b)</li> </ul>
Services included	<p>Traditional TV services</p> <p>Traditional radio services</p>	<p>Downloads of AVC</p> <p>AVC on Demand</p>	

### 3.3. The reaction to the first proposed AVMS Directive.

As was already mentioned in the Introduction Part, the first proposal for an AVMS directive lead to a number of arguments. For instance, it was argued that the distinction between linear and non-linear services was “arbitrary” and not technological neutral because the same content would be the subject to different regulations depending on technical considerations such as the “push” and “pull” nature of the means of delivery.<sup>90</sup> Thus, it was suggested by H. Lutz, that the minimum requirements should be imposed on all “transmissions of audiovisual content by electronic means” and that additional requirements should be imposed according “the relevance that particular content has for public opinion.”<sup>91</sup>

The criticism was also expressed regarding whether or not AVMS meets its single market and competition promoting objectives. In particular, it was argued, that extension of the TWF might be unlikely to benefit the single market since “new AVC services are either national (IPTV) or global (the Internet Based AVC services)” and the objective is already largely met through the E-commerce

<sup>90</sup> [http://www.alm.de/leadmin/Dateien/EG\\_Fernseh-lang.pdf](http://www.alm.de/leadmin/Dateien/EG_Fernseh-lang.pdf) ; The BDSMA report, last visited 2006/12

<sup>91</sup> H. Lutz, ‘The Distinction between linear and non-linear services in the proposal for pursuit for audiovisual media directive’ (2006) Computer and Telecommunications Law Review.

Directive (Indepen, BDSMS). Furthermore, Ofcom commissioned assessment of Indepen(2005) Report also highlighted that the objectives of providing a level playing field have been met differently in the NRF where the new entrants were distinguished from incumbent services. Thus, it was suggested that the same approach should be taken in the context of the AMSD since the treating the new and the incumbent providers regardless of their market influence would not promote competition but strengthen the position of the incumbent providers at the cost of smaller or new entrants. The overall conclusion of Indepen report was that the cost of an extension could outweigh the benefits unless it is done through co-regulation, given the high number of service providers on the supply size.

### **3.4. Indirect Impacts for audiovisual sector as assessed in Rand Report.**

The comprehensive summary of the indirect impacts of the first AVMS Directive for video regulation, including its effects on the development of information and communication technology (ICT) and the “creative content” sectors was provided by Ofcom commissioned Rand Report. For the purpose of this essay, the following topics assessed by Rand Report will be summarized:

#### **Enforcement of non-linear content .**

As it was stated in the Report:

“Non-linear enforcement is a critical issue. User-generated and user-hosted content create their own problems. There are tens of thousands of potential commercial video podcasters, but no regulatory body in the sector can register such a body of AVMS suppliers. The only feasible way to enforce the directive is via the intermediaries, content host or service provider as a ‘proxy’ for the content editor.”

Rand Report approached the question of the new liability placed upon those responsible for video editorial content, in particular non-linear services. It rightly highlighted that effective enforcement of non-linear services would be feasible only via intermediaries such as network operators and content hosts given that otherwise the extensive number of non-linear content providers would greatly increase the regulatory costs required by enforcement. However, while under NTD regime content host acts ex post on the infringement complains received in the connection with content posted by its user, the effective enforcement of the proposed AVMS would “require a more substantial policing of these content providers”, thus would represent “a move from the fixed ISP business model as developed through the history of the consumer Internet, towards a cable or mobile “walled garden” model since its enforcement would”.

## **“Walled garden” or open platform**

Consequently, if network providers are required to inspect “foreign” video files that are transported via their network, this would represent a feature of “walled garden” model as opposed to open and “blind” ISP service. While the first one produce more user-lead innovation, the “walled garden” places a non-recoverable costs on the content innovator given that network provider can assess priority charge based either on content or traffic type. Thus, Rand Report highlighted that the business strategy choice of “walled garden” versus an open platform is also a choice of potential regulatory burdens and demonstrated how the proposed AVMS effects that choice. However, it suggested that rather than “a good versus evil” or “successful versus failed” we should view the choice between “walled garden” v “open platform” according the difference between two different cost recovery models.

### **The portraits for broadband media development**

The four portraits were further provided to demonstrate the alternatives for broadband media development (midband malaise; user-controlled commons; winner takes it all; and win-win portraits) according whether “walled garden” or open platform is going to be the winning platform. Rand identifies these four portraits of the future for European content as following:

1. Midband malaise- in which regulatory or market bottlenecks slow growth in the sector and confine Europe to a follower role, with investment growing faster in the USA and East Asia.
2. User-controlled commons-in which consumer-generated and distributed content captures most of the value in the sector for social rather than economic benefits;
3. Winner-takes-all- in which one sector grows at least twice as rapidly as others, capturing most increased consumer spending and shaping investment, pricing and technological development;
4. win-win- in which all sectors share in the benefits of rapid growth under light touch regulation.

If ISPs chose to construct “walled gardens”, they may be able to manage growth in traffic and revenues to ensure a “winner-takes-all” scenario: they would be the winners. User-controlled commons is less likely in “walled garden” models, as content from within the “walled gardens” is granted preferential treatment. By monitoring traffic they should be able to avoid “user-controlled commons”, and by monetizing traffic and providing attractive content they could avoid “midband malaise”.

By contrast, an open-interoperable portal could find itself in either win-win or user-controlled commons scenarios: the first being excellent for the business plan; the later “midband malaise” being

potentially disastrous, where increased traffic “free-rides” the network and content owners do not pay the network operator, thus “there is less initiative for the late to upgrade than when they can capture some part of revenues.”<sup>92</sup>

### **The Virtuous Circle of Broadband Supply, Skills and Demand.**

The Rand Report also drawn the attention to the debate about “The Virtuous Circle of Broadband Supply, Skills and Demand”<sup>93</sup> and to reverse effects it can have if operators are not able to capture returns to content provision. In particular, it concluded that:

“If insiders’ (incumbents or a select group of co-regulatory partners) are able to restrict access a two-tier system may emerge, in which walled-garden denizens pay for protected access and for authorised content, while those in the open-access world have much cheaper – but also much riskier – access to (often illegal) content. If insiders are wholly unable to monetise content provision, they may lose the incentive to invest in broadband networks. A ‘happy medium’ is one in which (for example, by bundling or content-related charging) operators retain sufficient returns to drive investment in network enhancements that – to some degree at least – support ‘public good’ infrastructures capable of sustaining sector development.”

### **Footloose nature of value web networks<sup>94</sup>**

The next important observation made in Rand Report is footloose nature of value web networks and the implication it may imply from the regulator prospective. In particular, the Rand Report highlighted that response of value web networks to regulatory conditions are not as uniform, smooth or predictable as in the traditional linear, vertically-integrated and controlled environments given that the industry structure is more complex and more dynamic than for the traditional industries. It was further demonstrated that in a case of value web networks, there is the dependence of value chain elements on the dominant actors that could allow dominant player to trespass his rents and power lower down the value chain. In a case of AVMS this would mean that network operators, who are often in a dominant position, may choose to enforce the regulation via their upstream contractual links with content providers that will in turn “stunt the development of otherwise competitive value meshes” and re-enforce the position of the dominant actor. It therefore, was concluded that the effects of regulation may have significant impact on the eventual industry

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<sup>92</sup> Rand report.

<sup>93</sup> E. Lorentzen, Norwegian Ministry of Trade and Industry, for the OECD Working Party on the Informational Environment Panel; quoted in Rand Report.

<sup>94</sup> Value network are defined by Christensen as: "The collection of upstream suppliers, downstream channels to market, and ancillary providers that support a common business model within an industry. When would-be disruptors enter into existing value networks, they must adapt their business models to conform to the value network and therefore fail that disruption because they become co-opted."

[http://en.wikipedia.org/wiki/Value\\_network](http://en.wikipedia.org/wiki/Value_network)

structure that emerge, and in particular the impact will be “most profound in the business model choice between a “walled garden” and an open-interoperable content model.”

#### **Part IV. The Second proposal of Audiovisual Services Directive.**

With the reflection to the criticism expressed in the relation to the first proposal of the AVMS, the Internal Market and Consumer Committee of the European Parliament proposed changes, the European Parliament and Council of Ministers have reached agreement on the main aims of the Commission proposal to modernise the rules governing the audiovisual services industry. The new, modernized, Audiovisual Media Services Without Frontiers (AVMS) Directive was accepted to offer a comprehensive legal framework by covering all audiovisual media services with less detailed and more flexible regulation and modernised rules on television advertising. The concept of “programme” was introduced to limit “audiovisual media services” to what is “is comparable to the form and content of television broadcasting” and to exclude what today is YouTube or Myspace “video clip culture”. Thus, the modified definitions of the AVMS Directive are:

(a) “audiovisual media service” means:

- a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council. Such audiovisual media services are either television broadcasts as defined in paragraph (c) of this Article or on-demand services as defined in paragraph (e) of this Article.

audiovisual commercial communication.

aa) “programme” means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedy, documentary, children’s programmes and original drama.

ab) 'Editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.

(b) ‘media service provider’ means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(c) ‘television broadcasting’ or ‘television broadcast’ (i.e. a linear audiovisual media service)

means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;

(d) 'broadcaster' means a media service provider of television broadcasts

(e) 'on-demand service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider;

## Part V. Conclusion

Given that the second proposal of AVMS Directive has limited its definition of audiovisual media service to one that “is comparable to the form and content of television broadcasting”; specified the term of “editorial responsibility” and excluded on-line games one may ask why it was necessary to include the whole Part 3? Does the AVMS still affect UGC? The answer is: Yes.

First of all, because UGC doesn’t exist in vacuum but in a very complex environment where it constitutes a very last chain of the value mesh networks described in the Rand Report. This means that its future depends not on whether a concept of “non-linear provider” covers every YouTube user who posts content and receives a share of the advertising income, but on the existence of the “non-linear content” concept. The effective enforcement of non-linear content is still a going to be an issue that indirectly effects the end-user innovation through its direct effect on service providers’ costs. The complexity of Internet environment means that the response of its “nodes” is not as uniform and predictable as in the traditional linear, vertically-integrated and controlled environments.

Second, because making the concepts of “commercial and non-commercial” and “whose form and content is comparable to the form and content of television broadcasting” qualifying features for a stricter regulation, the AVMS Directive encourages audiovisual forms of UGC to stay a “video clip” culture as it is today. However, it was argued in Part 2, the regulators should not rely on the assumption that “content abundance guarantees consumer satisfaction”<sup>95</sup>. On the contrary, media policy should take account of the scarcity of audience attention and develop a new “proactive” approach that strive to “cultivate, not just satisfy, public tastes” and engage a “distractive and fractured” audience in content that improve the service of democratic values<sup>96</sup>. Given that certain type of video-based UGC has a potential to fill production gaps previously discussed in this work, this does not seem to be consistent with the media policy goal if regulation creates an initiatives for the UGC sector to restrict creativity in order to avoid qualification for a form that is “comparable to the form and content of television broadcasting”. It is not clear why UGC that meet quality requirements of traditional broadcasting should be consider less UGC content than YouTube video clip?

Furthermore, given that AVMS recognized the potential of future contribution of non-linear content to the promotion of European works<sup>97</sup>, it would expressly in the interests of the regulators if UGC could evolve and increase the share of European works and diversity available via non-linear audiovisual services. Regulators also have to keep in mind that dependence of the “long tail” content on American hits<sup>98</sup>, could make the promotion of cultural diversity unfeasible unless pro-

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<sup>95</sup> E. Goodman, ‘Media Policy out of the Box: content abundance, attention scarcity, and the failures of digital markets.’ (2004) Berkeley Technology Law Journal

<sup>96</sup> *ibid*

<sup>97</sup> Rec. 35 of the new AVMS directive

<sup>98</sup> Rand Report



active policy of UGC production is applied. To conclude, the pro-active approach of regulation required to support for the further development of audiovisual UGC in the direction that cultivate product and content diversity.

It seems, therefore, that consequences of state attempts to regulate non-linear service among its attempts to distinguish between non-linear services are difficult to forecast as well it is difficult to exclude that regulation would not do harm. This lead us to questions such as “Was intervention necessary?” and: “What are the objective the intervention seeks to safeguard?”

As it was argued in connection to the Political Agreement reached on AVMS Directive: “There was no reason to regulate on-demand audiovisual content other than to safeguard essential public interests such as protecting minors, encouraging cultural diversity, preventing incitement to hatred and basic consumer protection rules” So, if the driving forces are mainly “content problems”, the next question to ask is: “Whether the “content problems” are broadcast specific or they would require a horizontal, technology neutral, approach?”

Given the weight to E. Barendt’s argument, Ad van Loon come to the conclusion that the four justifications used by governments for their broadcasting polices are no longer valid and that regulators should re-think the rationalities behind the regulation of content services.<sup>99</sup>

Therefore, if there is no continuing need to impose restrictions on broadcasters in terms of permissible content, the shift could be made towards a horizontal approach to the content problems.<sup>100</sup>

The first step would include the removal of the grounds of national derogation in the relation to the Article 3 (4) of the E Commerce Directive that allow Member States to derogate from the country of origin principle in view of public policy objective such as “protection of minors” or “fight against any incitement to hatred”.<sup>101</sup>

The second step would include the evolving tools of horizontal regulation such as the already confirmed rationalities of the current AVMS Directive: i.e. user choice and control, the concept of co-regulation and the self-regulation initiatives of the Internet sector.<sup>102</sup> With an industrial development that makes applications of technological controls such as filtering possible via both PC

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<sup>99</sup> *ibid.*

<sup>100</sup> Possibility of horizontal approach was mentioned among others in I. Walded, *Telecommunications Law and Regulation*. (2005)

<sup>101</sup> Art 3(4) was argued by many commentators to be one of the reason of the extension of the TVWT to on-linear services, in particular H. Johnson ‘Television without Frontiers: timely change or premature extension’ or T. Ballard, partner at Field Fisher Waterhouse, at the CLA Conference, Stockholm (2006).

<sup>102</sup> E. Lievens, ‘Harmful new media content: the latest regulatory trends’ argued for the commitment to co-regulation on the future as an alternative for stricter measures; The potential of self-regulator measures (ICRA; IWF), however, doesn’t allow us to refer them as ‘deserted’ (E. Lievens) and they also should be accounted among the tools for horizontal regulation.

or fully-digitally television receiver, the power should be given to people to decide what content to receive or block.<sup>103</sup>. Such empowerment of user would proportionally balance between “content problems” and freedom of expressions, as well as it would exclude those indirect impacts the AVMS currently provides for.

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<sup>103</sup> As quoted in I. Walden, ‘Telecommunications Law’: The same user-led filtering also seems to be achievable by the fully digital television receivers and reference can be made to Article 22b of the 1997 Television Without Frontiers Directive, in which Council called for the research into device that allowed the filtering out of certain programmers<sup>103</sup>.

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